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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6783

DARRYL KING,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari to review an order of the New York Court of Appeals entered December 28, 1973 (33 N.Y. 2d 917) which unanimously affirmed an order of the Appellate Division, Second Department entered June 11, 1973 (42 A.D. 2d 587) which unanimously affirmed a judgment of the Supreme Court, Kings County rendered May 24, 1971 convicting Petitioner of felony murder (N.Y. Penal Law Sec. 125.25); manslaughter in the second degree (N.Y. Penal Law Sec. 125.15); attempted robbery in the first degree, N.Y. Penal Law Secs. 110.05, 160.15; attempted grand larceny in the third degree (N.Y. Penal

Law Secs. 110.05, 155.30; 2 counts of assault in the first degree (N.Y. Penal Law Sec. 120.10) and possession of a weapon as a felony (N.Y. Penal Law Sec. 265.05) and imposing concurrent sentences of 25 years to life imprisonment on the felony murder; a maximum of 15 years on manslaughter in the second degree; a maximum of 15 years on attempted robbery; an unconditional discharge on attempted grand larceny in the third degree; a maximum of 15 years on each of two assaults in the first degree counts; and a maximum of seven years imprisonment on the weapons count.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Question Presented

Whether Court conducted *voir dire* of prospective petit jurors pursuant to a directive of the Administrative Board of the New York State Judicial Conference deprived Petitioner of his right to counsel, cross-examination, a fair and impartial jury and due process in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Statutes and Regulations Involved

Rule 20.13 (22 NYC RR 20.13) of the Administrative Board of the New York Judicial Conference states:

> "A '*voir dire*' examination in any criminal cause shall be conducted following the selection of prospective jurors. The judge presiding shall initiate the

voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective jurors any questions which he thinks necessary, affecting their qualifications to serve as jurors in the cause on trial. The judge may also, in his discretion, permit both parties, commencing with the People, to examine the prospective jurors individually or collectively to the extent he deems necessary, regarding their qualifications to serve as jurors."

Statement of Facts

"Wade Hearing"

LORRAINE HAWTHORNE testified that she was employed at the Wetson's take out food shop on May 25, 1970. She was working the shift which began at 6:00 P.M. (47).* On the above place and date at about 9:30 P.M. appellant came up to the cash register and ordered a bucket of chicken (48). Since the chicken had to be prepared, the witness proceeded to serve her next customer. She saw King's face both when he placed his order, and when she filled the order (48). The bill was rung up on the register and King was asked to pay the $2.11 he owed.

Appellant then called to someone, "What else do you want, man. . . ." (49). King's friend asked for three hamburgers. A disagreement between the witness and King developed over payment. Appellant then opened his jacket and displayed what appeared to be a handle of a pistol which was jammed into his pants (50-51). It was a "big brown gun" (51).

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* Numerical references are to the Record on Appeal.

Appellant demanded that he be given all the money from the cash register. While the witness was complying with this demand, she heard someone say, "Halt." Suddenly a shot rang out. Just before she ducked to the floor for cover, she saw King reaching for his pistol.

After she fell, she heard a second shot. Pandemonium broke loose. She saw King and his friend flee in the direction of Prospect Park (53). She believed that King and his friend had been into the Wetson's shop at around 6:00 P.M. inquiring about employment (53).

Lorraine Hawthorne had an indelible impression of King in her mind:

> "After the incident happened, I could never get him off my mind, because every time I dream, I could just see him right there." (54)

She vividly recalled that King had dark moles or acne scars (54). Hawthorne made an in-court identification of King as the perpetrator. She was positive that it was him (54).

There came a time, after May 25, 1970, but prior to the commencement of trial when she appeared at a police station for a lineup. She saw about two or three different arrays of colored men. She selected Darryl King from one of these displays. She never selected anyone other than Darryl King nor did she fail to select him from an array in which he was present (55-56).

On cross-examination Hawthorne acknowledged never seeing King prior to May 25, 1970 (56). The witness stated that the man she saw at 6:00 P.M. seeking employment looked a lot like Darryl King (59). After the shooting occurred, Hawthorne told the police that she thought that one

of the perpetrators was the same person who came in earlier to apply for a job (60).

Lorraine Hawthorne was taken to the 71st precinct on the day of the shooting, and was shown numerous photographs (61). She did not see King's photograph (62). The lineups were not conducted on the same day that Hawthorne was shown photographs. The lineups were not conducted one after the other. "No. One line-up a day. Maybe I seen one line-up earlier and one late at night." (62). She had already seen an earlier lineup before picking out Darryl King from a lineup in which he appeared (62).

The witness was brought from her home to the police precinct by a detective. "He said he wanted to bring me to the 71st precinct to see a line-up. . . . He just said he wanted me to see another line-up to see if I could identify the man who robbed Wetson's" (63).

She was asked if she had selected any photographs which looked like the person at the counter in Wetson's. She claimed that there were persons who possessed individual features similar to the perpetrator. Hawthorne insisted that this is what she meant when she testified in the Criminal Court, Kings County on June 10, 1970 that some photographs looked like the perpetrator (63).

The witness did not see who said, "Halt." He was on the next line (67). She believed the whole incident in Wetson's took five to ten minutes (68).

There were eight or nine people in the lineup in which Darryl King participated. These other participants were black men of different sizes, age, and shades of complexion (68). She first noticed a pistol in the other perpetrator'

hand when Appellant "started to talk about the money" (69).

DETECTIVE LAWRENCE MONEYPENNY of the 71st detective squad testified that he was assigned to investigate the case. He was present on May 29, 1970, when Lorraine Hawthorne was brought to the 71st precinct to view a lineup (76). There were eight black men in the lineup. Darryl King participated in this lineup, but did so only after he was advised of his rights with respect to the lineup.* (77). Lorraine Hawthorne identified King at this lineup (77).

Moneypenny denied that the suggested to Hawthorne that the suspected perpetrator was a participant in the lineup (78). King was given the right to select his place in the lineup. He selected the last position on the right. Hawthorne viewed all those in the lineup and selected Darryl King as the perpetrator.

He denied that Hawthorne ever selected the photograph of anyone other than Darryl King (83). The participants in the "Darryl King" lineup were all of approximately the same size and height as Appellant (83). Lorraine Hawthorne selected King's photograph on the same day that she picked him out from a lineup (82).

On cross-examination Appellant's counsel elicited the acknowledgment that of seven photographs shown to Lorraine Hawthorne, King's was somewhat smaller than the others (86). The selection of Darryl King's photograph occurred before King was apprehended (87).

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* Appellant was told he had a right to a lawyer present before he stood in a lineup. King was asked but refused the assistance of counsel.

Because the Assistant District Attorney could not locate one of the People's identification witnesses, it was agreed that the trial would commence and temporarily suspend when the witness was located. Appellant noted no objection to the Court's suggested method of operation (88).

Appellant moved to suppress any in-court identification by Lorraine Hawthorne (89). Justice Starkey denied the motion (90). Objection was also noted to the conduct of jury selection under the then existing rule of the State Judicial Conference (Rule 20.13). This objection was overruled (93). A jury was selected.

The Trial

The prosecutor made his opening statement.

DONNA SIRVENT identified the body of the deceased; it was her husband Miguel Sirvent.

LORRAINE HAWTHORNE testified in a similar manner as at the "Wade" hearing. When King drew his pistol, he glanced back at his accomplice (121). The witness was sure that Appellant was the perpetrator. Appellant's mouth and chin coupled with the presence of pock marks were features which stood out about the perpetrator. "I am very positive that it is him. I will never forget his face" (125).

On cross-examination she adhered to her pre-trial testimony as to the manner in which the robbery and killing unfolded. After she heard someone yell "Halt" and heard a shot, King began to pull out his gun (138). She saw appellant flee in the direction of Flatbush Avenue (139). King and his accomplice fled at the same time, in the same direction (140, 145).

King "looked like" the same man who came to Wetson's at about 6:00 P.M. seeking employment (146). Appellant carried his pistol jammed in his pants; he did not use a holster (147). The witness saw Appellant draw his weapon, but never viewed the complete pistol (147).

Lorraine Hawthorne did not see Appellant and his accomplice enter Wetson's at the same time. While inside Wetson's, the accomplice's only words were "Three hamburgers." She estimated that the entire criminal transaction lasted about five or ten minutes (160). She never saw Darryl King prior to 6:00 P.M. on the evening in question (160). She admitted being scared to death and freezing from what transpired (160). Nonetheless, she asserted, on re-direct examination that:

> "I was not frightened enough not to see his face. I don't care how scared somebody is, if they see a person that's going to do something like that to them, they will never forget, but I did never." (161-162).

On re-cross examination defense counsel questioned the witness concerning pre-trial identification. She witnessed three lineups—selecting King in the final one (163). Hundreds of photographs were shown to her prior to the lineups (164). She did tell Detective Moneypenny that certain photographs resembled the perpetrator (163). This pretrial statement was clarified at trial. Lorraine Hawthorne asserted that any photographs which she selected were done so only because of the similarity to a particular facial feature of the perpetrator (164). Although Miss Hawthorne selected two or three photographs with features similar to those of the perpetrator, at no time did she say "This

is the man" as to a photograph other than Appellant's (165).

ELIAS FILLIPPIDES was examined next, first, outside the presence of the jury on the issue of identification. He was the witness who had been unavailable for pre-trial hearings. The witness was the manager of Wetson's on the evening that the deceased was shot to death (167). He was not present at 9:30 P.M. when the occurrence in controversy transpired (168).

The witness identified Darryl King as the man who applied for employment at about 6:00 P.M. on the evening in question. Prior to trial Fillippides identified King from a lineup (172-173). The Court ruled that the identification methods were proper and refused to suppress an in-court identification (175).

DETECTIVE PHILIP IANNUCCILLI of the 71st Squad assisted in the investigation concerning Miguel Sirvent's death. He prepared and served a search warrant issued by Criminal Court Judge Aloysius J. Melia on May 29, 1970. The search warrant was marked as People's Exhibit 8 for identification (183). Defense counsel objected to the search and his objection was sustained (183).

DETECTIVE LAWRENCE MONEYPENNY of the 71st Squad testified that he placed Darryl King under arrest on May 30th at 2:00 A.M. (184). The Court, out of the presence of the jury denied the prosecution the right to make affirmative use of a ".45 caliber" holster, which was seized pursuant to the search warrant issued by Judge Melia (188).

Prior to the commencement of trial on April 8, 1971, and out of the presence of the jury, defense counsel called the

Court's attention to a newspaper article in the "Daily News" headlined, "Cop Murder Trial Hears Widow," and requested that Justice Starkey *voir dire* the jury to see if they had seen and been influenced by the article. Inquiry revealed that the jury was untainted.

DR. DOMINICK DIMAIO, the assistant chief medical examiner of Brooklyn, testified that as a result of an autopsy he performed on Michael Sirvent's body, he concluded that Sirvent died from a bullet wound (193). Either a .38 or .45 caliber bullet could have caused this death (194, 195).

PATROLMAN JOSEPH W. QUIRK, of the Police Department's Ballistics Squad testified that he arrived at Wetson's at 10:10 P.M. on May 25th. The deceased had already been removed. One discharged .45 caliber shell and one spent bullet was recovered (196). The deceased's .38 caliber Smith and Wesson pistol had not been fired (196). The witness concluded, that two shots had been fired inside Wetson's, one went on the floor, the other through the window.

VINCENT M. LEAHY testified that on May 25, 1970 Miguel Sirvent was employed as a New York City Police Officer (203).

Defense counsel moved, and Justice Starkey denied, a request that a mistrial be declared because of the newspaper article in the "Daily News".

OLIVER ROSS, JR. was another People's identification witness. He was examined, in the first instance, out of the presence of the jury.

He testified that on the evening of May 25, 1970, he was returning from evening classes at Erasmus Hall High

School. He was at the intersection of Empire Boulevard and Flatbush Avenue (Wetson's location) in order to transfer to the bus which takes him to his home.

The witness was going in to Wetson's when he heard a "cap sound." Someone running out from Wetson's collided with him, and knocked him to the ground. The person who collided with him carried a gun. It was Darryl King (207).

On cross-examination Ross indicated that he knew it was 9:30 because he looked up at a clock. He was opening the door at Wetson's when King knocked him down (210). He only heard one shot (211). King fled in the direction of the subway (213).

Concededly, the witness only had a few seconds to identify the person who knocked him to the ground. The opportunity to see who did it came as Ross was struck and as he fell (213). King did not turn around while fleeing (213). Appellant had a "pretty large" pistol in his right hand (214). Ross did not see the window in Wetson's crack.

Ross did not inform the authorities of what he had seen (215). Several days after the shooting Ross' name came to the attention of the authorities. He was taken to the 71st precinct where he was asked if he knew the identity of the person who fled from Wetson's. Ross told the police that it was Darryl King (213). Nonetheless the police displayed five or six photographs for Ross. The witness selected King's photograph (219). At no time was Ross a suspect in the Sirvent killing (220). Ross saw a great deal of Darryl King during the three years prior to the Sirvent killing (220). Ross and King never had "bad feelings" (221).

Appellant's motion to suppress Ross' in-court identification was denied (223).

Appellant moved to reopen the "*Wade*" hearing by calling Detective Moneypenny. The request was granted.

Detective Moneypenny stated that Ross was located on May 30th. Ross was shown five photographs; one of which was King's. The detective knew that King was under arrest at the time he showed Ross the photographs (229). Ross told Moneypenny that King was the person who had bowled him over (229). Ross was never a suspect in the Sirvent killing (230, 234). Ross knew King. Moneypenny checked police records and ascertained that Ross had no police record (234). Justice Starkey adhered to his decision denying King's motion to suppress Ross' in-court identification.

OLIVER ROSS, JR. testified at trial as he did at the "Wade" hearing. He made an in-court identification of Darryl King as the person who fled from Wetson's (238). When Ross entered Wetson's he did not observe people running in all directions (246). Ross was confronted with his grand jury testimony in which he said he did not see who had bowled him over (250). On re-direct examination it was shown that Ross identified King in the grand jury as the person who fled.

The People rested.

The Court denied King's motion to dismiss the indictment for failure to make out a *prima facie* case (257).

The Defendant's Case

DARRYL KING was sworn and testified in his own behalf. He lived at 51 Sterling Place, Brooklyn—about a block and a half from Wetson's. Prior to Sirvent's death, he had been employed at Wetson's (263).

On May 25, 1970 at about 6 P.M. he accompanied one Garami Graham to Wetson's to "see the manager about a job" (263). He denied returning to Wetson's later that evening (264). Although a holder of an honorable discharge and free from previous criminal convictions, he was a heroin user (264). At about 7:00 P.M. he tried to "shoot up", but the naroctics were "bad."

He admitted frequently being in Wetson's prior to May 25, 1970. He specifically denied being inside Wetson's on May 25, 1970 at 9:30 P.M. (267).

On cross-examination it was shown that King made a pre-indictment statement in which he claimed going to Wetson's to look for a job at 3:30 or 4:00 P.M. (271). He was also confronted with inconsistencies as to when he "shot up" with heroin. In a pre-indictment statement he claimed to have "shot up" at 9:00 P.M.—at the trial he conceded being "bad on time" but insisted that it was 9:45-10:00 P.M. (279-280).

King admitted receiving Army training in the handling of a .45 caliber pistol (282). He was asked if he had brought a ".45 holster" home from the Army. He conceded, over objection that he did. The request for a mistrial was denied (283).

On re-direct examination he admitted being a narcotics user, but denied having a habit (283). He denied bringing a .45 caliber weapon home from the service (284).

ELSIE KING, Appellant's mother, testified she saw her son on three occasions from 6:00 P.M. until midnight on May 25, 1970 (285). She saw him after 10:00 P.M.; he appeared to be normal (286).

On cross-examination Mrs. King conceded not knowing that her son had used narcotics on May 25, 1970.

The Defendant rested (288). The People rested (288). Appellant's motion for a directed verdict was denied (288).

Both sides summed up. The Court charged the jury on the applicable law. The jury returned a verdict of guilty, but at the conclusion of a post-verdict hearing, declined to impose capital punishment. On May 24, 1971, Justice Starkey sentenced Darryl King to 25 years to life imprisonment on Felony Murder, a maximum of 15 years on the Manslaughter conviction, and 15 years on the Attempted Robbery I conviction, a conditional discharge on Attempted Grand Larceny III, a maximum of 15 years on Assault I, and 7 years imprisonment on the Possession of a Weapon charge. All sentences were imposed to run concurrently (459-460).

ARGUMENT

POINT I

The jury selection practice imposed by the Administrative Board of the State Judicial Conference is neither unconstitutional nor a denial of a fair trial.

Petitioner predicates his argument for the grant of a writ of *certiorari* on the basis that the conduct of petit jury selection by other than counsel constitutes such an unfairness as to deny due process of law. Petitioner, thus, launches a full-blown attack upon the trial court's conduct of the *voir dire* of the petit jurors. Although an objection was lodged prior to the commencement of the jury selection process, it is important to note that the record is barren of any objection or exception with the jury which was actually empaneled and sworn. Respondent contends that absent a showing claim or protest in the trial record that any or all of the veniremen were biased or prejudiced constitutes a waiver of the objection (*United States* v. *Ragland*, 375 F 2d 471 [2d Cir. 1967], *cert.* den. 390 U.S. 925 [1968]; *Graham* v. *United States*, 257 F 2d 724, 729 [6th Cir. 1958]; *Fabian* v. *United States*, 358 F 2d 187, 191 [8th Cir. 1966]; *Harbold* v. *United States*, 255 F 2d 202, 205 [10th Cir. 1958]).

Respondent contends that absent a specific showing of prejudice which resulted because the trial judge and not the lawyers conducted the *voir dire* renders Petitioner's claim meritless. Petitioner attempts to tie certain factors in the case to his claim that court conducted voir dire is insufficient to pass constitutional muster.

Petitioner tells us that strong emotions were elicited by the murder of a police officer which became overwhelmingly prejudiced when considered in the context of a black accused with a prior history of drug usage. While these factors did exist there has been no proof in any of the New York courts that the jurors who passed the trial judge's rigorous screening process were effected by a particular ideology or harbored racial prejudice. Notwithstanding the presumption that the jury was fair and impartial, absent some extrinsic proof to the contrary we must conclude that the jury was operating in an untainted fashion. It should not be overlooked that while the defendant is a member of a minority group so were the overwhelming majority of the prosecution's witnesses!*

Although Rule 20.13 is no longer in effect**, it would seem to go no further than 18 U.S.C. Rule 24(a)—a statute which has withstood constitutional attack (*Rodgers* v. *United States*, 402 F 2d 830 [9th Cir. 1968]; *United States* v. *Duke*, 409 F 2d 669, 671 [4th Cir. 1969], *cert. den.* 397 U.S. 1062; *United States* v. *Anderson*, 433 F 2d 856, 858 [8th Cir. 1970]).

The thrust of appellant's dissatisfaction with Rule 20.13 is indicative of a misunderstanding of the constitutional and statutory purposes of the *voir dire*. Appellant feels that the Court conducted *voir dire* denies him a valuable opportunity to develop a sense of rapport with the triers of fact. The loss of this opportunity however, does not rise

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* Petitioner, Miss Hawthorne and Mr. Ross are black.

** The examination of prospective jurors is governed by New York Criminal Procedure Law Sec. 270.15 (effective Sept. 1, 1971). Rule 20.13 existed for approximately 9 months until superseded by the CPL provision.

to constitutional or statutory unfairness. It is merely a policy question resolved by state law or local rule.

The purpose of *voir dire* is to enable the parties to obtain an impartial jury, not to select the jurors (*United States* v. *Williams*, 417 F. 2d 630, 631 [10th Cir. 1969]). It is important to note the absence, both on the record and in appellant's brief, of any allegation that appellant was tried by an illegal or unfair panel.

As long ago as in *Brown* v. *New Jersey*, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899), this Court made clear the freedom the States have to develop diverse methods of criminal procedure. The Court made it clear that the right to challenge potential jurors is the right to reject, not to select the panel. "If from those who remain an impartial jury is selected, the constitutional right of the accused is maintained." (*Brown* v. *New Jersey*, *supra*, 175 U.S. 172, 175.)

No constitutionally specified *voir dire* procedure has ever been mandated. The sole requirement is that:

> "The manner of selection is calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury." (*Brown* v. *New Jersey*, 175 U.S. 172, 175.)

We contend that just as there is "room" in the constitution to accommodate the *voir dire* procedures followed in the federal courts, so is there room for Rule 20.13.

Although the issue of constitutional validity is determined by power and reasonableness, there is great wisdom supporting the Rule. At a time when the court dockets are clogged by the vast increase in the number of indictments,

it becomes imperative to explore means for maximizing available court resources. The saving in time accounted for by Court controlled *voir dire* saves the time of the jury, as well as the bench and bar. It also speeds court calendars and hence helps ease unfortunate delays which further prolong the delay for the incarcerated accused who awaits trial.

Rule 20.13 was repealed by the effective date of Criminal Procedure Law § 270.15. We merely ask that the practice be constitutionally sanctioned. The merits of such a *voir dire* practice remain, of course, with the State Legislature and the Judicial Conference.

CONCLUSION

The petition for a writ of *Certiorari* should be denied.

Dated: Brooklyn, New York
June, 1974

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